

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

CONDEV WEST, INC.,)	
)	Case No. 96R-39
)	
Appellant,)	
)	
vs.)	FINDINGS AND ORDERS
)	
)	
LANCASTER COUNTY BOARD OF)	
EQUALIZATION,)	
)	
Appellee.)	

Filed July 16, 1997

Appearances:

For the Appellant:	Jerry M. Slusky, Esq. 1650 Farnam Omaha, NE 68102
For the Appellee:	Michael E. Thew #15771 Deputy Lancaster County Attorney 555 South 10th Street Lincoln, NE 68508

Before: Commissioners Edwards and Reynolds

Edwards, for the Commission:

SUMMARY OF DECISION

The Commission reverses the decision of the Lancaster County Board of Equalization which denied Taxpayer's protest, and grants Taxpayer's request for a reduction in assessed value of the subject property.

NATURE OF THE CASE

Condev West, Inc. ("Taxpayer") owns certain commercial real property located in the City of Lincoln, Lancaster County, Nebraska. Taxpayers filed a protest with the Lancaster County Board of Equalization ("County") alleging that the subject property was valued for purposes of taxation in excess of the market value of the property. By way of relief, Taxpayer requested that the proposed 1996 valuation of \$10,200,000 be reduced to \$7,100,00. County denied the protest, from which decision Taxpayer appeals.

DUTIES OF THE PARTIES

A taxpayer who is dissatisfied with the county assessor's determination of assessed value of real property must file a written protest with County. Neb. Rev. Stat. §77-1502 (Reissue 1996).

A county board of equalization must, between June 1 and July 25 of each year, fairly and impartially equalize the values of all items of real property in the county "except agricultural and horticultural land . . ." so that all real property is assessed uniformly and proportionately. Neb. Rev. Stat. §77-1504 (Reissue 1996).

"For purposes of equalization of the valuation of any protested real property, the county board of equalization shall make its adjustment so that the value of the protested property compares to the average level of value of the class or subclass of property in which the protested property is categorized." Neb. Rev. Stat. §77-1504 (Reissue 1996).

ANALYSIS

The Tax Equalization And Review Commission ("Commission") took Judicial notice of the following: the pleadings in Case File 96R-0039; *Marshall Valuation Service; Nebraska Assessor's Reference Manuals, Volumes 1 and 2*; the I.A.A.O. textbook *Property Assessment Valuation, Second Edition*; The Property Tax Division of the Department of Revenue Published 1996 Ratios and Measures of Central Tendency; the 1996 Commercial County Profile for Lancaster County; Title 442 (Tax Equalization & Review Commission rules and regulations); and the Uniform Standards of Professional Appraisal Practices (USPAP). Exhibits 1 through 9 were offered by Taxpayer and Exhibits 10 through 13 were offered by County. All Exhibits were received into the record without objection.

I. TAXPAYER'S EVIDENCE OF VALUE

Taxpayer offered a restricted appraisal report completed by a licensed commercial real estate appraiser with the stated opinion of value of \$7,100,000. The appraiser used all three approaches to value with a correlation of the three at the conclusion of the report, as required by professionally accepted appraisal practices.

The Marshall Swift Valuation service was used to determine the indicated value under the Cost Approach. The Replacement Cost New (RCN) indicated that the value of both the building and parking structure was \$10,293,992. After all forms of depreciation were accounted for the net value of the building and parking structure was \$4,680,000. The land value was determined to be \$2,650,000. The total indicated value under the Cost Approach was therefore \$7,350,000.

Taxpayer's Income Approach to value utilized the Rent Per Square Foot method to arrive at Gross Revenue. Rents of \$4.25 and \$4.50 per square foot were selected (page 20 of Appraisal). Using professionally accepted appraisal practices, Taxpayer's appraiser arrived at an Income Approach indicated value of between \$7,075,000 and \$7,450,000 for the subject property.

All the comparables used in Taxpayer's Market Data Approach to value were located in a super regional mall with four or more anchor stores. From Exhibit 4 the comparables are:

Comp #	Bldg Size	Mall/State	#of Anchors	Sales Price	Date	Sq. Ft
24	140,864	Northshore Mall, MA	5	\$5,500,000	1993	\$39.04 (As adj\$38.29)
26 (Subject prior to sale)	156,806	Gateway Lincoln, NE	5	\$6,000,000	1994	\$38.26 (As adj\$44.91)
28	212,487	BelAir Mall Alabama	4	\$7,000,000	1995	\$32.94 (As adj\$41.78)
30	129,478	Westminster Mall, CO	6	\$6,826,023	1996	\$52.72 (As adj\$45.04)
32	120,050	Fox Valley Mall, ILL	4	\$4,000,000	1996	\$33.32 (As adj\$37.05)

The square foot range of values, after adjustments, are \$37.05 to \$45.04. Subject property sale after adjustment for remodeling is \$44.91 which results in a value of \$7,042,158. The Taxpayer's appraisal using the Income Approach to value arrived at an indicated level of value ranging from \$6,750,000 to \$7,200,000.

II. COUNTY'S EVIDENCE OF VALUE

County's appraiser calculated the value of the land portion of the subject property based on values from comparable commercial properties in the City of Lincoln. (Report, page 31.) This study indicated an \$18.00 per square foot of land value, for a total of \$2,822,508.

County's appraiser also used Marshal Valuation Service for his Cost Approach to value of the improvements on the subject property. The RCN, as determined by the county's appraiser for both the building and parking structure was \$13,286,913. The total depreciation from all sources was \$3,244,442, which therefore yielded an indicated value of \$10,042,471 for the building and parking structure. When the land value of \$2,822,508 was added to the building value the total indicated value of the subject property using the Cost Approach was \$12,864,979. County's appraiser placed the greatest weight on the Cost Approach to Value.

County's appraiser also used market rents to determine the gross income of the subject property as the first step in the Income Approach to value. The appraiser cited the publication of Dollars & Cents (Report, page 41) which indicates that Department Stores Median Rent Paid is \$2.86 per square foot. However, of the seven properties chosen as "comparables" to arrive at market rent, four are not located in a super regional mall. These four comparables are also much smaller than the subject property. Two of the "comparables" are located in Gateway Mall, as is the subject. However one of the "comparables" listed shows that the lease expired in 1991. The other "comparable" is based on a contract which includes rent from 1975. That rent probably does not reflect current market rental rates. The remaining comparable is located in a Lincoln mall that has only two anchor stores, and is not a located in a super regional mall. A representative rental rate of \$6.25 per square foot was selected. (The specific information is found at page 49 of Exhibit 11) No allowance was made for vacancy and collection (credit loss) because appraiser states no vacancy occurs in Gateway Mall and no mention was made of collection or credit loss. However, for the management fee, he used 6% and stated that it covered bad debt allowance. Although allocated differently, both appraisers used 10% deductions to arrive at NOI (Net Operating Income). County used an 8.5% capitalization rate

and arrived at an indicated value of \$10,376,868.

The great disparity in the Income Approach final indicated values of the parties may be attributed to the difference in the per square foot rental rates used. County used \$6.25 per square foot and Taxpayer used \$4.25 and \$4.50. The disparity would also result from the difference in capitalization rates of 8.5% (by County) and 9.0% (by Taxpayer).

Property Assessment Valuation, Second Edition, page 233 states:

‘The understanding and proper selection of rates used in the income approach are necessary if valid estimates of value are to be made. A small difference in the capitalization rate will result in estimates differing by thousands of dollars.’

County’s appraiser also used that Sales Comparison Approach to determine the indicated value of the subject property. The two “comparables” used were K-Mart stores, both of which are located in the City of Lincoln. However, K-Mart Stores are discount stores. Furthermore, neither of the “comparables” are located in a Super Regional Mall. One is free standing at 27th and Cornhusker Highway and the other is located at 56th and Highway Two in a Mall anchored by major discount stores, K-Mart and Target. The County therefore concluded that the indicated value under this approach was \$11,211,629. Little weight can be given to this conclusion, however, since the “comparables” not, in fact, “comparable,” and adjustments would be difficult, if not impossible, to arrive at with any degree of confidence.

III. NOTICE TO TAXPAYER

The Commission notes from Exhibit 1, that the recommendation of the Referee in the instant case was \$7,475,000. A notice incorporating the referee’s recommendation of value was sent to the Taxpayer in Fort Worth, Texas, on July 16th. This notice stated that the subject property’s final value would be determined at a hearing which would be held on July 22, 1996 at 10:00 a.m.. From the transcript at page 5, it appears that this is the first time Taxpayer knew the value was going to increase to \$10,200,000 and that “the reasoning for it is to equalize with the rest of the shopping center”. Subsequently, the County Board of Equalization raised the value to \$10,200,00 and sent notice of its final decision to the Taxpayer on July 24, 1996.

IV. VALUE OF THE SUBJECT PROPERTY

The sales price of the subject property in 1994 was \$6,000,000. In 1995 major renovation and redecorating took place. The building permit issued for this renovation and redecorating listed the total cost as \$5,200,000 (County report page 17). Using those gross figures, total investment (or price) of the subject property was \$11,200,000. This investment was made over a two-year time frame, 1994-1995. However, "cost," "price" and "value" are not always synonymous, as noted in *Property Assessment Valuation, Second Edition*, at page 17.

Here, a critical factor in analyzing the Income Approach is the "risk" factor. Such consideration is essential given the commitment of such extensive remodeling funds to an existing structure which was originally built in 1963. "Growth investments are exemplified by the real estate purchase, where there is a possibility of loss as well as the opportunity for growth." (*Property Assessment Valuation, Second Edition*, page 187). Neither party addressed this issue. Therefore, neither party's determination of the indicated level of value based on the Income Approach can be considered credible.

County's indicated level of value as determined from the Sales Comparison Approach cannot be considered credible for the reasons set forth above. Furthermore, although Taxpayer's "comparables" under its Sales Comparison Approach were all taken from Super Regional Malls, all of those "comparables" came from market areas located outside of the State of Nebraska. Taxpayer's appraisal failed to address the possibility of significant issues which arise when drawing comparables from different market areas such as demographics, per capita income, factors that may have affected the sales transactions, thus affecting the confidence level of the conclusions.

Finally, the Taxpayer's determination of value based on its interpretation of the Cost Approach to value for the building and parking structure arrived at a total depreciated value of \$4,680,000. This conclusion was well documented and supported by the evidence adduced. However, the County's land value of \$18.00 per square foot for a value of \$2,822,508, based on the same economic factors, appraisal methods and conclusions as to the land value of other mall properties is clearly more credible.

FINDINGS OF FACT

The Commission, in determining cases, is bound to consider only that evidence which has been made a part of the record before it. No other information or evidence may be considered. Neb. Rev. Stat. §77-5016 (3) (Reissue 1996). The Commission may, however, evaluate the evidence presented utilizing its experience, technical competence, and specialized knowledge. Neb. Rev. Stat. §77-5016 (5) (Reissue 1996).

From the pleadings and the evidence the Commission finds and determines as follows:

1. That Taxpayer is the owner of record of certain commercial property located in the Gateway Mall in Lincoln, Lancaster County, Nebraska.
2. That Taxpayer was dissatisfied with the 1996 valuation of \$11,335,800 which the County Assessor placed on the subject property. Taxpayer therefore timely filed a protest with Lancaster County Board of Equalization.
3. That County Referee placed a valuation of \$7,475,000 on the subject property. Notice of that value, and of the hearing date of July 22, 1996, was sent to Taxpayer in Fort Worth, Texas on July 16, 1996.
4. That at the hearing July 22, 1996 County overruled the Referee's valuation and set \$10,200,000 as the value for the subject property for 1996.
5. That from such decision, an appeal to the Tax Equalization & Review Commission was properly filed.
6. That subject property was purchased in 1994 for \$6,000,000.
7. That subsequently, major renovations and redecorating to Dillard's standards took place for a cost, as per the building permit, of \$5,200,000.
8. That Taxpayer's appraisal reported values by Market Data Approach of \$6,750,000 to \$7,200,000; by Income Approach of \$7,075,000 to 7,450,000; and by Cost Approach of \$7,350,000.
9. That County's Income Approach selected a \$6.25 per square foot cost to determine gross income that was derived from non-comparable sources which

were too small, were not located in a super regional mall, or both.

10. That County's Market Data Approach consisted of two Lincoln K-Mart Sales, neither of which are in a Super Regional Mall.
11. That County's Calculation of Land Value of \$2,822,508 was supported by the evidence adduced and is equitable with the land values placed on other mall anchors.
12. That Taxpayer's appraisal indicated Cost Approach value of \$4,680,000 for the building and the parking structure was supported by the evidence.
13. That evidence has been adduced to establish that the decision of the Lancaster County Board of Equalization denying Taxpayer's request for a reduction in the value of the subject property was unreasonable and arbitrary.

JURISDICTION

Jurisdiction of the Tax Equalization and Review Commission is set forth in Neb. Rev. Stat. §77-5007 (Reissue 1996), as amended by L.B. 397 (1997 Session).

STANDARD OF REVIEW ANALYSIS

The Tax Equalization and Review Commission is not a court. The Commission was created pursuant to state law to provide for an accessible and affordable system of review of valuation decisions. Under such circumstances, applying the standard devised by the Nebraska Supreme Court to the Commission would be presumptuous and ill-advised.

Therefore, the Commission must adopt a standard applicable to cases it hears and decides. This standard must be in keeping with the precept that tax laws are to be strictly construed, and construed in the light most favorable to the taxpayer. *See, e.g., Nebraska Annual Conference of the United Methodist Church v. Scotts Bluff County Board of Equalization*, 243 Neb. 412, 416, 499 N.W.2d. 543, 547 (1993), and *Sioux City and Pacific R.R. v. Washington County*, 3 Neb. 30, 32 (1873). In determining that standard, resort must be made to the language of the statute. The Nebraska Supreme Court has often held that statutory construction is a simple task. The Court has held "In construing a statute, it is presumed that the Legislature intended a sensible rather

than an absurd result. . . Statutory language is to be given its plain and ordinary meaning. . .” *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 451, 550 N.W.2d 907, 913 (1996).

Finally, the Nebraska Supreme Court has held that an administrative decision is “arbitrary” when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W. 2d 151 (1996); *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W. 2d 112 (1996).

CONCLUSIONS OF LAW

The Commission must, for the reasons set forth above, and pursuant to Neb. Rev. Stat. §77-1510 (Reissue 1996), hereby does conclude as a matter of law that the action of the Lancaster County Board of Equalization should be reversed.

ORDER

IT IS THEREFORE ORDERED as follows:

1. That the decision of the Lancaster County Board of Equalization which denied Taxpayers’ protest is reversed.
2. That Taxpayers’ residential real property known as Gateway Shopping Center, Sublot 5, Lincoln, Lancaster County, Nebraska, more commonly known as Dillards, shall be valued as follows for tax year 1996:

Land	\$2,822,508
Improvements	\$4,680,000
Total	\$7,502,508

3. That this decision, if no appeal is filed, shall be certified within thirty days to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-1511 (Reissue 1996).

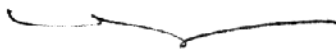
4. That each party is to bear its own costs in this matter

IT IS SO ORDERED.

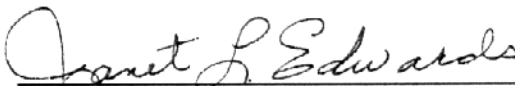
Dated this 16th day of July, 1997.



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Mark P. Reynolds, Chairman



Janet L. Edwards, Commissioner